IN THE MATTER OF CRAIG KESTNER, LEGAL OWNER AND PETITIONER FOR SPECIAL HEARING AND VARIANCE ON THE PROPERTY LOCATED AT 13217 CHERWIN AVENUE 15th ELECTION DISTRICT 6th COUNCILMANIC DISTRICT	* * * * * *	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY CASE NOS.: 19-402-SPHA and 20-090-SPHA

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OPINION

This matter comes before the Board of Appeals ("Board") as a *de novo* appeal from an Order dated September 29, 2020, from Administrative Law Judge ("ALJ") Paul M. Mayhew, granting a variance request pursuant to Baltimore County Zoning Regulation ("BCZR") § 304.1. Craig Kestner, ("the Petitioner") seeks approval for the construction of a single-family home on two lots with a combined width of 50 ft. in an area that requires 55 ft. for such construction. The ALJ granted the variance, and a number of individuals and a community organization noted this appeal. The Board held a *de novo* virtual hearing on February17, 2021. A virtual public deliberation was held on April 7, 2021, at which the Board voted unanimously to deny the variance request.

HISTORY

Mr. Kestner purchased lots 155, 156, 157, 158, 159 and 160 in the Twin River Beach subdivision in 2014. The plat for that subdivision was recorded in 1929. Each lot is 25 ft. wide. There was a pre-existing garage on lot 157 and a single-family home on portions of lots 157-158. Mr. Kestner lived in the home for four years. He used lots 155 and 156 for home recreational purposes. In 2018 he sold lots 157-160 as a single unit, leaving 155 and 156 in his possession. The present zoning, which is DR5.5, requires a lot width area of 55 ft. for the

construction of a single-family home, but together, lots 155 and 156 only make 50 ft. As a result, Mr. Kestner filed a petition for special hearing and request for a variance in Case No. 19-402-SPHA ("Kestner 1"). That petition sought a regular variance from the 55 ft. requirement pursuant to *Cromwell v. Ward*, 102 Md. App. 691 (1995). It also sought confirmation that lots 155 and 156 had remained independent and had not merged into the other four. A contested hearing was held before ALJ Mayhew who ruled: (1) lots 155 and 156 had not merged into the other four; and (2) because there was nothing unique about lots 155 and 156, a variance from the 55 ft. requirement was not justified under *Cromwell*. Mr. Kestner appealed the variance ruling to the Board.[1]

Mr. Kestner requested that the appeal in Kestner 1 be held in abeyance to permit the filing of this case ("Kestner 2"). Kestner 2 raised the variance issue pursuant to § 304.1. This argument could have been raised in Kestner 1. By reason of the appeal in Kestner 1, ALJ Mayhew's ruling in Kestner 1 was not a final resolution of the case. Consequently, there was no prohibition by reason of *res judicata* or collateral estoppel that precluded consideration of Kestner 2.

Mueller v. People's Counsel for Baltimore County, 177 Md. App. 43 (2007) discusses the difference between BCZR §§ 307 and 304.1. BCZR § 304.1 permits what amounts to a variance for the construction of a single-family home on a lot undersized by width if three

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[1] At our hearing on February 17, 2021, Protestants argued that Mr. Kestner's appeal in the first case meant that the merger issue which Mr. Kestner had won was also available to be re-litigated in any *de novo* hearing because the hearing was *de novo*. The Board rejected that contention. First, the Baltimore County Code at § 32-3-401(a) indicates that any person "feeling aggrieved" from a decision by the ALJ has the right to appeal to the Board of Appeals. Mr. Kestner was certainly not aggrieved, nor did he feel aggrieved, from the merger ruling in his favor. Second, Mr. Kestner's counsel was scrupulously careful in his written notice of appeal in the first case to limit the appeal to the variance issue. Third, the Protestants in the first case did not appeal the merger ruling. Therefore, in the Board's view, the merger issue was not automatically subject to review by reason of Mr. Kestner's appeal on the variance question and was not otherwise preserved for appellate review.

conditions are met. The first two conditions were clearly satisfied here: (1) the lot was recorded as part of a valid subdivision prior to March 30, 1955; and (2) all of the other height and area requirements are met. The third requirement is the only point of contention in this matter. This third condition requires that the owner seeking the variance did not own adjoining property that would have made adherence to the width requirement possible. The specific language of subsection C states:

> C. The owner of the lot does not own sufficient adjoining land to conform the width area requirements contained in these regulations.

With virtually no discussion of subsection (C), ALJ Mayhew found that § 304.1 compelled the variance grant.[2]

FACTUAL PRESENTATION

The only witness called by the Petitioner was Bruce Doak who was accepted as an expert in surveying, zoning and land use. Through Mr. Doak, the petitioner presented the site plan which had been modified from Kestner 1 to include the front, side, and rear setbacks that had been presented in and ratified by ALJ Mayhew in Kestner 2. Mr. Doak testified that Mr. Kestner purchased lots 155-160 in 2014. The deed was introduced into evidence showing that Mr. Kestner paid $118,000 for the six lots. Protestant Exhibit 6. Mr. Doak established that the Twin River subdivision had been recorded prior to March 30, 1955, and that the site plan introduced as Petitioner's Exhibit 1 showed that the proposed construction met all of the other

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[2] ALJ Mayhew also imposed specific and appropriate setback conditions as well as approval from DEPS and DPW regarding flood control and stormwater management prior to any construction. *See* Kestner 2 at p.4. These are conditions which Mr. Kestner himself suggested to ALJ Mayhew and which he reiterated before this Board. Given the nature of the Board's ruling, the Board did not address these conditions. In this regard, *see* n.4, *infra* at p. 6.

height and area requirements. He also testified that Mr. Kestner had sold lots 157-160 in 2018. Petitioner's Exhibits 5A-H and 6A-K were photographs depicting the site from various perspectives. They also showed that the new owners of lots 157-160 had constructed a large stockade fence along the edge of lot 157. He testified that Mr. Kestner could not have added 5 feet from lot 157 onto lot 156 because the pre-existing garage would likely have resulted in an odd configuration and may also have required some type of rear setback variance. Mr. Doak testified to the necessity of addressing the stormwater and flood issues and of obtaining a permit to build in a critical area, all of which required approvals by DEPS and DPW prior to the issuance of a building permit. The Petitioner also presented deeds and other public records showing that the granting of variances in this subdivision was quite commonplace. Petitioner Exhibits 9A-H. Finally, he testified that there would be no detriment to the health and welfare of the public so long as the drainage and stormwater issues were properly addressed.

The cross-examination of Mr. Doak was straight forward. Mr. Doak conceded that most, if not all, of his similar cases in which variances were granted did not involve the ownership of adjoining properties or had other possible differences from the Kestner situation. He did acknowledge that Mr. Kestner owned all six lots for over 4 years, and prior to the sale of the four lots, there was possibly sufficient area to make two lots on which a second house could have been constructed and still satisfy the width requirements. This concluded the Petitioner's case.

The Protestants presented a number of lay witnesses who expressed concern over drainage and flooding. They also presented photographs showing lots 156 and 157 being largely flooded at one point. *See e.g.,* Protestants' Exhibit 10(7). John Dawson, the neighbor

directly adjacent to the Kestner lots, testified that his view of the water would be diminished by construction of a house on the subject property. He also stated that the flooding depicted in Exhibit 10(7) was not unusual. Thomas Brooks, who lives five houses away, testified on behalf of the Twin River Beach Protective and Improvement Association, Inc. (TRBPIA) which is the community association in which the Kestner property is located. Mr. Brooks indicated that the TRBPIA opposed any further building because it would be ill-advised to "cram" another house in the area for aesthetic reasons, because of possible harmful effect on the fragile eco-system, and because of the possibility of impaired property values. He presented a petition signed by approximately 40 members of the community opposing the project.[3] Finally, Ruth Hauf, a 50-year resident of the area, testified that most of the building permits that are issued are for reconstruction on small lots, and the relief requested in this case would be, in her words, "very unusual".

ANALYSIS

The Board's decision in this matter turns on the application and interpretation of BCZR § 304.1(C). Accordingly, many of the factual disputes are not particularly germane to the Board's determination. For example, the treatment of other properties in a neighborhood can be quite probative. In this case, however, the way zoning variances were decided with other properties neither supported nor detracted from Petitioner's argument. The case turns entirely on the question of the effect of Mr. Kestner's ownership of the adjoining properties. This is a

[3] The Board agrees with Protestants' counsel that Petitioner's objection to the language of the petition, and particularly to the use of the word "variance", is completely without merit. Both Kestner 1 and Kestner 2 raised the issue of a variance albeit under differing analyses. It is obvious that the signers of the petition knew what they were signing and what its purpose was. Indeed, Mr. Brooks testified directly that everyone who signed the petition "was opposed to this house on this lot".

unique factual circumstance, and absent a variance grant that presented the issue of ownership of adjoining property, the way other properties in the subdivision were handled provides no particular insight. *See infra* at p.8-10. Similarly, the support by or opposition from others in the community, while normally an important consideration, does not affect the significance of Mr. Kestner's prior ownership of adjoining property. At the end of the day, whether or not Mr. Dawson's view of the water would be impaired by the new house has virtually no impact on the interpretation of § 304.1(C).[4]

Section 304.1(C) indicates that if an owner has adjoining property, then the easy variance under § 304.1 is not available. Under those circumstances, an owner would have to obtain a regular *Cromwell* variance which has additional requirements, like uniqueness of the property and reduced use of the property without the variance. These are not required for a § 304.1 variance. It is only necessary to show that the three simple requisites of § 304.1 are satisfied: that the subdivision was recorded prior to March 30, 1955, that the other area and height requirements are met, and that the owner did not own adjoining land such that the 50 foot width requirement could have been met by utilizing some of the adjoining land. *See generally Mueller v. People's Counsel of Baltimore County, supra.*, 177 Md. App at 70-91.

In this instance, Mr. Kestner purchased the six lots in 2014. In 2018, he sold off the four 25 foot lots as one parcel, while keeping just two.[5] It goes without saying that one who owns adjoining parcels cannot blithely sell off some, keep two, and then claim the special

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[4] In the event that this decision is reversed, the Board would have to resolve all open questions as well as determine how the application of § 304.1 would, if at all, affect the safety, health, or welfare of the public. *See* Kestner 2 at p.3, and n.2 *supra.*

[5] The record indicates that Mr. Kestner purchased the six lots in 2014 for $118,000 (Protestant's Exhibit 6). SDAT records show that he sold the four lots in 2018 for approximately $180,000, with the remaining two undeveloped lots having a combined value of $10,400.

benefit of § 304.1. This would completely undermine the basis of having § 304.1(C). On the other hand, presumably, if one did sell the adjoining property in good faith, then there is no reason to deny the benefits of § 304.1. In this instance, Mr. Kestner did not testify so there is no record of his actual thought process. Consequently, we have only the external circumstances by which to assess the situation.

The Baltimore County Zoning Commissioner's Policy Manual has commentary on this question of the ownership of adjoining property at p. 3-3. That commentary discusses various aspects of the issue and seeks to balance the equity of permitting long time owners of adjoining property who divide their parcels in good faith with short time owners who seek to maximize development opportunities. Mr. Kestner is a short-term owner who appears to have purchased the property with ultimate re-sale in mind. The Manual directs County planners to look at a host of circumstances in an effort to assess good faith including dates of purchase of the parcels and the purpose of the purchase. The commentary also describes a number of sham or nominee transactions which are not permitted because they would undermine the area width requirements. It also describes a situation not too different than the instant one:

> Another method is to sell adjoining undersized lots which were recently purchased to individual, bona fide buyers. This would permit the new owner of a single undersized lot to build without a variance, where such permission would not have been granted to the owner of the entire tract.

While acknowledging that the circumstances of every situation must be individually assessed, the Commentary does provide some guidance to planners. It posits a (non-binding) six-year rule to help determine good faith:

> . . .[I]f the single owner of an undersized lot contiguous to another parcel owned by him has transferred ownership of one to another, 304c would apply if such new ownership has been held for a period of at least six years. This rule shall not preclude exceptions where it is clear, and equitable, that single ownership was not intended to avoid area requirements.

By its express terms, this is by no means a hard and fast rule. What it does do, however, is illustrate the importance of gauging the intent of the individual seeking to qualify under § 304.1 where that individual has held contiguous property in the recent past. As indicated above, Mr. Kestner did not testify. Mr. Doak testified that Mr. Kestner could not have added five feet from lot 158 to 157 because the garage which is approximately 50 years old would encroach on the side setback requirements of the now 55 foot lot. This does not answer the question as to why the garage could not have been removed[6], why there could not be two buildable lots each of 75 feet, or why there could not be two lots of varying sizes made out of the combined 150 foot parcel such that each was over 55 feet wide (like 90 and 60 feet, 70 and 80, 83 and 67, etc.). There is nothing magical about lots being in 25 foot sections.

Petitioner presented records from two cases which touch on the operation of § 304.1 without providing clear guidance. Exhibit 9A concerns a 2006 case at 13205 and 13207 Gundale Avenue in the Twin River subdivision. The case was initiated by Gerald H. and Barbara C. Kestner.[7] It appears from the records – which are somewhat difficult to interpret with exact precision – that those Kestners received a variance for a vacant lot at 13205 of 50.4

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[6] Mr. Doak testified that he believed that the garage was as old as the pre-existing house. It appears from the deeds that the house, and therefore the free-standing garage, were built around 1959.

[7] The exact relationship between Gerald and Barbara Kestner and Craig Kestner is unclear. The documents in Exhibit 9A make it appear that Gerald and Barbara may be Craig's parents. Some of the photographs placed into evidence by the Petitioner were possibly taken by Barbara Kestner. The pictures have captions which refer to "Craig's lot". *See* Petitioner's Exhibits 6A-K. The informality of that reference suggests a close relationship.

feet wide contiguous to another 50.4 foot wide lot upon which the Kestner home was built. Gerald Kestner's parents had purchased the four lots composing the two properties in 1956, and Gerald Kestner thereafter purchased the lots once it became too difficult for his parents to maintain the property. The zoning decision permitting the variance of 50.4 feet in lieu of the 55 foot requirement for 13205 does not mention § 304.1, but it does state that the variance petition requests permission to build a new home ". . . on a 50.4 foot lot in lieu of the required 55 feet **with a contiguous owner**". (Emphasis supplied). That language seems to gesture at § 304.1. The closest neighbor supported the variance request, and there appeared to be no opposition. The opinion of the zoning commissioner granting the variance used vague *Cromwell* language regarding "circumstances and conditions" that "are peculiar to the land or structure", findings unnecessary under § 304.1. *Mueller v. People's Counsel*, 177 Md. App. at 87. Clearly, though, there was no available adjoining property by which two lots, each satisfying the width requirement, could be made. Any sound reading of the decision, leads to the conclusion that, whatever the stated doctrinal basis, the finding was squarely within the language, intent, and spirit of § 304.1. As a result, it does not further the analysis herein.

Exhibit 9D is a bit more complicated. In that case, one owner in 1996 sold four 25 foot lots (167-170) on Cherwin Road in Bird River to Daniel and Brenda Pauszczewicz and two abutting lots (165-66) approximately 51 feet wide to the Wallaces, who were the party seeking the variance.[8] There is no discussion about the prior owner except to say that he sold the respective pieces of property to the Wallaces and the Pauszczewiczes in 1996. Exhibit 9D at

[8] Mr. and Mrs. Pauszczewicz apparently own four additional adjoining lots in the rear, but those lots do not impact the width requirements of the Wallace property.

p.2. Neither Mr. Pauszczewicz nor any other person objected to the variance. In the opening paragraph, the Zoning Commissioner refers to § 304. In the paragraph granting the variance the opinion refers to § 307, which is the standard variance provision. Unlike the opinion in Exhibit 9A, there is no language regarding uniqueness so it would appear that § 304.1 is the real basis for the decision, and the later reference to § 307 is either mistaken or the conflation of two differing analyses. So, while there is no inquiry into the intent of the unnamed seller, it would appear that the Wallaces purchased their two lots in good faith for the purposes of § 304.1. Perhaps because there was no objection to the variance, no one had any incentive to look behind the transaction which sold the four lots to one owner and two lots to the other. At the same time, there is no reason to doubt the Wallaces' good faith so the operation of § 304.1, if that is indeed the basis for the decision, is reasonable and understandable. Once again, that case does not contribute to the analysis in this matter except to show that variances and/or accommodations under § 304.1 are possible under different circumstances.

The *Mueller* case cited above also has some discussion of the adjoining property question. In that case, the owner had purchased two adjoining properties **at different times** and **each of which satisfied the width requirements at the time**. 177 Md. App. at 90. They constructed a home on one lot and then years later, sold off the other lot. Under the factual circumstances of that case, the Court determined that there was not sufficient adjoining land to make the second lot conform to the width requirements which were enacted after the lots were subdivided. As the Court stated: "Neither [of the two relevant lots] was rendered nonconforming by virtue of actions taken by the elder Muellers, or appellants, *after* the zoning law in issue was enacted." *Id.* (Emphasis in original). Mueller appears on its facts to be quite

similar to the transaction in Petitioner's Exhibit 9A discussed above at p. 8-9. In this matter, the actual method of subdivision by Mr. Kestner rendered the remaining two lots being non-buildable without the special grandfathering variance provision.

The Board does not enjoy issuing a ruling that would appear to limit the usability and alienability of lots 155 and 156. This Board is often faced with situations where an absence of foresight results in the Board being asked to untangle a messy but otherwise avoidable problem. It would have been useful for Petitioner to have carefully studied the situation before selling off the four lots. Consulting zoning experts at that point might have resulted in a more creative subdivision of the property. A simple subdivision of the six Kestner lots into two lots of varying widths would have resulted in two lots buildable by right.

In Kestner 1, the ALJ indicated "regret" that a fair and conscientious application of the law required rejecting the petition for a standard variance. (Opinion at p.5). Similarly, we must apply § 304.1 fairly and equitably as it is written even if there is a resulting hardship for Mr. Kestner. The burden of proof in this matter is on the Petitioner to show that he acted in good faith such that the § 304.1 exception applies to him. On this record, however, we cannot conclude by a preponderance of the evidence that Petitioner has met this burden.

CONCLUSION

For these reasons, we deny the Petitioner's request for relief under § 304.1.

ORDER

For the reasons stated in the Opinion accompanying this Order, it is this 20th day of May, 2021 by the Board of Appeals of Baltimore County

ORDERED, that the approval pursuant to BCZR § 304.1 to construct a home on lots 155 and 156 of the Twin River Beach subdivision, said lots having an approximate combined width of 50 feet in lieu of the 55 foot required width, be, and the same hereby, is **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

William A. McComas, Panel Chair

See following page
Joseph L. Evans

Adam T. Sampson /tmp
Adam T. Sampson

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

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May 20, 2021

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RE: In the Matter of: *Craig Kestner*
Case Nos.: 19-402-SPHA and 20-090-SPHA

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letter

c: Craig Kestner
John Dawson/Twin River Beach Protective and Improvement Association
Bruce E. Doak
Office of People's Counsel
Paul M. Mayhew, Managing Administrative Law Judge
Stephen Lafferty, Director/Department of Planning
David Lykens, Director/DEPS
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